A **HARCHARAN SINGH SOHAN SINGH**

v.

RANJIT KAUR S GEAN SINGH

B COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
ABDUL MALIK ISHAK JCA
WAN ADNAN MUHAMAD JCA
[CIVIL APPEAL NO: P-02-468-2003]
C 8 OCTOBER 2009

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Decision of Court of Appeal to grant or refuse leave - Whether appealable*

D ***CIVIL PROCEDURE:*** *Appeal - Appeal to Court of Appeal - Leave to appeal - Discretion of Court of Appeal to grant leave, how exercised - Value of subject matter of appeal, whether an issue of substance - Court of Judicature Act 1964, s. 68*

E ***CIVIL PROCEDURE:*** *Appeal - Appeal to Court of Appeal - Leave to appeal - Value of subject matter less than RM250,000 - Whether leave to appeal required - Court of Judicature Act 1964, s. 68*

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Subject matter of appeal involving declaratory relief - Subject matter of appeal*
F *clearly determined to be less than RM250,000 - Whether leave to appeal required - Practice Direction 2 of 1996 - Court of Judicature Act 1964, s. 68*

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Whether*
G *leave to appeal necessary - Value of the subject matter of the claim, how assessed - Whether value of the subject matter at the time claim is filed the determinant factor - Court of Judicature Act 1964, s. 68*

The appellant and his brother jointly purchased and registered a house in 1963 ('the property'). The appellant claimed that
H sometime in 1965, he purchased his brother's half undivided share in the property. The appellant's brother died in 1990 without transferring his half share in the property in favour of the appellant. The appellant, filed for a declaration in the High Court that he was the beneficial owner of the disputed property and for
I consequential orders relating thereto. His claim was dismissed by the High Court and he appealed to the Court of Appeal. The respondent - the administrator of the deceased brother's estate -

filed a preliminary objection to the appeal, alleging that the appeal was incompetent due to the appellant's failure to obtain leave to appeal. The appellant subsequently filed a motion (encl. 10a) for leave to appeal. The application (encl. 10a) was filed a day before the hearing of the appeal. The respondent submitted that the appellant's claim fell below the RM250,000 threshold prescribed by s. 68 of the Courts of Judicature Act 1964 thereby requiring the leave of the court. The appellant argued that: (i) his claim was above RM250,000 and even the respondent had valued the property at RM300,000 when applying for distribution of the deceased's estate; (ii) no leave was required as he was applying for specific relief, *ie*, a declaration. In support of his leave application (encl. 10(a)), the appellant submitted that: (a) it was filed late since the respondent's notice of preliminary objection was only filed a week before the hearing of the appeal; and (b) notwithstanding the appellant's views that the subject matter of the appeal was above RM250,000, the application for leave (encl. 10(a) was filed to 'regularise the appeal' in the event the court found that leave was a necessary prerequisite.

Held (dismissing the appeal with costs)
Per Tengku Baharudin Shah JCA:

(1) In both his pleadings and evidence the appellant had quantified the value of the subject matter of his claim below the RM250,000 prescribed threshold under s. 68(1)(a) CJA. Section 68 barred such appeals being brought unless leave of the Court of Appeal had been obtained. (para 12)

(2) It was not open to the appellant to adopt the respondent's valuation of the property in order to cross the s. 68 threshold. *Malayan Banking Bhd v. Basarudin Ahmad Khan* (foll). (para 13)

(3) The determinant factor was the value of the subject matter as disclosed in the claim when filed. Applying that test, the appellant in the instant case had to obtain leave of the Court of Appeal to pursue his appeal. *Yai Yen Hon v. Teng Ah Kok & Anor* (foll). (para 14)

(4) Section 68(1)(a) of the CJA which is clear and unambiguous makes no exception for leave to appeal in the case of specific relief such as an application for a declaration. Practice Direction No. 2 of 1996 issued by the President of the Court of Appeal, lists the instances where leave of the court is not necessary in appeals from cases not connected with a specified

A amount or value. Item (ii) of the said Practice Direction, specifically applicable to declarations, provides that the Practice Direction applies only to declarations respecting subject matters that have no value attached or where the value cannot be quantified. In the instant case, the subject B matter of the claim had been identified and its value determined. The failure to obtain leave of the Court to appeal in the instant case was thus fatal. *Mohd Tahir Mohd Shariff v. Ramlah Abdullah* (refd); *Mohideen Dawood v. Sneh Bhar* (foll); *Lam Kong Co Ltd v. Thong Guan* (foll). (paras 15 & 16)

C

(5) The Court of Appeal has the discretion whether or not to allow leave to appeal. There must be shown good and cogent reasons for its exercise. In the instant case the appellant had not substantiated his application for leave. The respondent's D filing of the preliminary objection a few days before the appeal could not be a ground for the exercise of the court's discretion to grant the appellant's late application for leave to appeal. The respondent's failure to give earlier notice of the legal impediment did not attract an estoppel. A point of law E may be raised at any stage with or without notice. Further, the appellant's own pleadings and evidence contradicted his stand that his claim was valued more than RM250,000. The Court of Appeal could not regularize the appeal since the issue was not one of irregularity but rather one of jurisdiction, F which was an issue of substance. The Court of Appeal had no other alternative but to dismiss the appellant's motion. (para 17)

Per Abdul Malik Ishak JCA (concurring):

G **(6)** The decision of the Court of Appeal whether to grant leave to appeal or not is final and not appealable. *Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors* (foll). (paras 29 & 30)

(7) The appellant's notice of motion in encl. 10(a) for leave to H appeal under s. 68(1)(a) of the Courts of Judicature Act 1964, filed at the eleventh hour should not be entertained. It ought to be dismissed forthwith. (para 33)

I

Bahasa Malaysia *Translation Of Headnotes*

Perayu dan abangnya telah bersama-sama membeli dan mendaftarkan sebuah rumah pada tahun 1963 ('hartanah itu'). Menurut perayu, pada tahun 1965, dia telah membeli sebahagian tanah yang tidak terbahagi abangnya di dalam hartanah itu. Abang perayu telah meninggal dunia pada tahun 1990 tanpa memindahmilik bahagiannya di dalam hartanah itu kepada perayu. Perayu memfailkan satu deklarasi di dalam Mahkamah Tinggi bahawa beliau adalah pemilik benefisiari hartanah yang dipertikaikan itu dan untuk perintah-perintah berbangkit. Permohonannya ditolak oleh Mahkamah Tinggi dan beliau pun merayu ke Mahkamah Rayuan. Responden - pentadbir pusaka si mati - memfailkan bantahan permulaan kepada rayuan, menghujahkan bahawa rayuan adalah tidak kompeten disebabkan kegagalannya untuk mendapatkan suatu kebenaran untuk merayu. Perayu kemudiannya memfailkan usul pemohon (encl. 10a) untuk kebenaran memohon. Permohonan (encl. 10a) telah difailkan sehari sebelum pendengaran rayuan. Responden berhujah bahawa permohonan perayu terjatuh di bawah puncak RM250,000 yang diberi oleh s. 68 Akta Mahkamah Kehakiman 1964 yang memerlukan kebenaran mahkamah. Perayu berhujah bahawa (i) permohonannya melebihi RM250,000 dan responden juga menilai hartanah tersebut pada RM300,000 apabila membuat permohonan untuk pengagihan pusaka si mati; (ii) permohonan tidak diperlukan kerana beliau membuat permohonan untuk relif spesifik, iaitu, deklarasi. Dalam menyokong permohonan membuat kebenaran (encl. 10(a)), perayu berhujan bahawa: (a) ia telah lewat difailkan kerana notis bantahan permulaan responden telah difailkan seminggu sebelum pendengaran rayuan; (b) walaupun pendapat perayu bahawa isi rayuan adalah melebihi RM250,000, permohonan kebenaran (encl. 10(a) telah difailkan untuk 'regularise the appeal' oleh itu mahkamah mendapati bahawa kebenaran adalah satu syarat duluan.

Diputuskan (menolak rayuan dengan kos)
Oleh Tengku Baharudin Shah HMR:

(1) Dalam kedua-dua pliding dan keterangan perayu telah menaksirkan nilai isi rayuan permohonannya di bawah puncak RM250,000 yang diberikan di bawah s. 68(1)(a) CJA. Seksyen 68 menghalang rayuan-rayuan sebegini dibawa kecuali jika kebenaran Mahkamah Rayuan telah diperolehi.

(2) Ia tidak terbuka kepada perayu untuk mengambil penilaian jurunilai responden mengenai hartanah itu semata-semata untuk melangkah puncak s. 68. *Malayan Banking Bhd v Basarudin Ahmad Khan* (diikuti).

(3) Faktor penentu adalah nilai isi rayuan seperti yang didedahkan di dalam permohonan apabila difailkan. Menggunapakai ujian tersebut, perayu di dalam kes ini mestilah mendapatkan kebenaran Mahkamah Rayuan untuk meneruskan rayuannya. *Yai Yen Hon v. Teng Ah Kok & Anor* (diikuti).

(4) Sekyen 68(1)(a) CJA yang jelas dan tidak taksa tidak membuat pengecualian untuk kebenaran membuat rayuan di dalam kes relif spesifik seperti permohonan untuk deklarasi. Arahan Amalan No. 2 1996 yang telah dikeluarkan oleh Presiden Mahkamah Rayuan telah memberi contoh-contoh di mana kebenaran mahkamah tidak diperlukan di dalam rayuan-rayuan dari kes-kes yang tidak mempunyai kaitan dengan jumlah atau nilai yang spesifik. Item (ii) Arahan Amalan tersebut, yang secara spesifik boleh digunapakai pada deklarasi-deklarasi, memberikan bahawa arahan amalan digunapakai hanya pada deklarasi-deklarasi mengenai isi-isi rayuan yang tidak mempunyai nilai atau di mana nilai tidak boleh ditaksirkan. Di dalam kes ini, isi permohonan telah dikenalpasti dan nilainya telah ditentukan. Kegagalan mendapatkan kebenaran Mahkamah untuk merayu di dalam kes ini adalah fatal. *Mohd Tahir Mohd Shariff v. Ramlah Abdullah* (dirujuk)*; Mohideen Dawood v. Sneh Bhar* (diikuti) *Lam Kong Co Ltd v. Thong Guan* (diikuti).

(5) Mahkamah Rayuan mempunyai budibicara untuk membenarkan atau tidak membenarkan kebenaran untuk merayu. Mestilah terdapat alasan-alasan yang bagus dan meyakinkan untuk melaksanakannya. Di dalam kes ini perayu tidak menyokong permohonannya untuk merayu. Pemfailan bantahan permulaan responden beberapa hari sebelum rayuan tidak boleh menjadi alasan untuk perlaksanaan budibicara mahkamah untuk membenarkan permohonan perayu yang lewat untuk kebenaran merayu. Kegagalan responden untuk memberi notis yang lebih awal mengenai halangan di sisi undang-undang tidak membawa kepada estoppel. Persoalan undang-undang boleh dibangkitkan pada bila-bila masa dengan notis atau tanpa notis. Seterusnya, pliding-pliding dan keterangan perayu menyanggahi pendiriannya bahawa permohonannya dinilaikan lebih dari RM250,000.

Mahkamah Rayuan tidak boleh membetulkan rayuan kerana isu bukanlah mengenai luar aturan tetapi adalah mengenai budibicara, iaitu isu utama. Mahkamah Rayuan tidak mempunyai alternatif lain tetapi untuk menolak usul perayu.

Oleh Abdul Malik Ishak HMR (menyetujui):

(6) Keputusan Mahkamah Rayuan sama ada untuk membenarkan kebenaran untuk merayu atau tidak adalah muktamad dan tidak boleh dirayui. *Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors* (diikuti)

(7) Notis usul perayu di dalam encl. 10(a) untuk kebenaran untuk merayu di bawah s. 68(1)(a) Akta Mahkamah Kehakiman 1964, yang difailkan pada masa yang lewat tidak patut diterima. Ia patut ditolak serta merta.

Case(s) referred to:

Amer Mohideen Dawood v. Sneh Bhar Ter Binder Singh [1996] 2 CLJ 955 CA ***(refd)***

Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors [1995] 3 CLJ 485 FC ***(foll)***

Lam Kong Co Ltd v. Thong Guan Co Pte Ltd [2000] 3 CLJ 769 FC ***(foll)***

Malayan Banking Bhd v. Basarudin Ahmad Khan [2004] 4 CLJ 596 CA ***(foll)***

Mohd Tahir Mohd Sheriff v. Ramlah Abdullah [2004] 1 CLJ 865 CA ***(foll)***

Soo Hong & Leong Kew Moi & Ors v. United Malayan Banking Corp Bhd & Anor [1997] 2 CLJ 548 CA ***(refd)***

Yai Yen Hon v. Teng Ah Kok & Sim Huat Sdn Bhd & Anor [1997] 2 CLJ 68 FC ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 68(1)(a), 96(a)

For the plaintiff/appellant - Datuk Mahinder Singh Dulku; M/s Mahinder Singh Dulku & Co

For the defendant/respondent - Balwant Singh Purba; M/s Balwant Singh & Co

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-471-1998]

[Editor's note: For the High Court judgment, please see Harcharan Singh Sohan Singh v. Ranjit Kaur Saean Singh [2003] 1 LNS 143.]

Reported by Andrew Christopher Simon

A

JUDGMENT

Tengku Baharudin Shah JCA:

[1] We dismissed this appeal with costs consequent to our decisions to uphold the respondent's preliminary objection pertaining to its competency for failure to obtain leave of this court under s. 68 of the Courts of Judicature Act 1964 (CJA) and to dismiss the appellant's eleventh hour notice of motion in encl. 10a for leave to appeal under the same section. We now give our reasons.

B

C

Background

[2] In 1963 the appellant and his deceased brother (the respondent's late husband) jointly purchased a house in Penang (the said property) and had it registered in their joint names. It was used as a family residence and occupied by their parents and siblings. The deceased was alleged to have sold his half undivided share in the said property (the disputed property) to the appellant in early 1965 and in 1966 his wife, the respondent, and their three children left him. The appellant claimed to have paid the purchase price between 1965 to 1967. He stayed on the said property until shortly after his marriage in 1971. The deceased apparently occupied the said property at various intervals until his death on 4 August 1990 without the transfer of the disputed property having been effected in the name of the appellant.

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[3] The appellant, as plaintiff in the court below, filed this action in 1998 seeking for a declaration that he was the beneficial owner of the the disputed property and for consequential orders relating thereto. He named the respondent, the administrator of the deceased's estate, as the defendant. His claim was dismissed by the High Court in Penang on 16 April 2003 after a full trial. He appealed against the said decision and filed his record of appeal in due time.

G

H

[4] The appeal was only fixed for hearing in this court in the week beginning from 24 November 2008. On 17 November 2008 the respondent's solicitors gave notice of a preliminary objection that the appeal was incompetent as no leave of the Court of Appeal was obtained.

I

[5] The parties came before us on 24 November 2008 but we could only accommodate them on 27 November 2008. When they returned on 27 November 2008 learned counsel for the respondent informed us that he was raising a preliminary objection for which he had given due notice. Learned counsel for the appellant then averred that encl. 10a which he filed the day before was also fixed for hearing that day. To expedite the disposal of the appeal we ordered that both the preliminary objection and encl. 10a be heard together.

Submission

[6] It was submitted on the respondent's behalf that the value of the subject matter of the claim, as pleaded in the statement of defence, was RM248,500. It was the same value assessed for estate duty in the schedule to the letter of administration issued to the respondent (see p. 430 Appeal Record). The same figure was also quoted in the respondent solicitor's letter to the appellant less than three months before the appellant filed his claim (see p. 424 Appeal Record). And the learned trial judge also found it significant that the appellant only decided to stake his claim after finding out the value of the disputed property in the letter of administration. (see p. 56 Appeal Record).

[7] It was contended that the appellant himself testified that he was willing to sell his share of the said property for a good price and that his neighbours had sold similar property for RM160,000 (see p. 256 Appeal Record). A half share was only worth RM80,000. There was also evidence that the appellant only offered to pay the Respondent RM10,000 for the disputed property (see p. 343 Appeal Record).

[8] It was argued that as the subject matter of the claim had been quantified and valued at well under RM250,000 leave of this court under s. 68 CJA was required and the appellant's failure to obtain such leave rendered his appeal incompetent. *Amer Mohideen Dawood v. Sneh Bhar Ter Binder Singh* [1996] 2 CLJ 955 CA was cited.

[9] Responding to encl. 10a, learned counsel submitted that the respondent, in her application for distribution of the deceased's estate only gave her estimation of the value of the disputed property but the Estate Duty Certificate fixed its value at the RM248,500. On the question of the appellant's claim being for a declaration, it was submitted on the authority of *Lam Kong Co Ltd*

A *v. Thong Guan Co Pte Ltd* [2000] 3 CLJ 769 that item (ii) of the Court of Appeal Practice Direction No. 2 of 1996 applies only to declarations respecting matters that have no value attached or those with value that cannot be quantified. This was not such a case.

B

[10] The appellant's encl. 10a was admittedly filed consequent to and in answer to the respondent's notice of preliminary objection. While maintaining the view that the subject matter of his claim was more that RM250,000, the appellant nevertheless felt his C application was "necessary, in the interest of justice, to regularise the appeal if it is found by this Honourable Court that leave is required." Learned counsel for the appellant submitted that the respondent herself declared that the value of the disputed property was RM300,000 when applying for distribution of the deceased's D estate. Having obtained a limited grant of letter of administration, the respondent offered to sell the same to the appellant. The value of the disputed property at the time of filing the claim on 8 July 1998 and at the trial in 2003 was alleged to be not less that RM300,000. Learned counsel sought to distiguish *Lam Kong* E *(supra)* on the facts as in that case there was a formal application with affidavit on the value. Relying on the decision of this court in *Malayan Banking Bhd v. Basarudin Ahmad Khan* [2004] 4 CLJ 596, it was submitted that the value of the subject matter of a claim in the context of s. 68(1)(a) should be seen from the F appellant's point of view as it was his claim that was dismissed. The respondent's declared value was adopted by the appellant for the purpose.

[11] It was also argued that no leave was required in this case as the Appellant's claim was for specific relief. *Soo Hong & Leong* G *Kew Moi & Ors v. United Malayan Banking Corp Bhd & Anor* [1997] 2 CLJ 548 CA was relied on as authority. On delay in making the application, it was submitted that the respondent was not prejudiced as the appeal records had been filed and the H respondent was also estopped from raising the objection now when he failed, even at the case management stage, to give any indication that the appellant's appeal was incompetent.

The Prelimanary Objection

I **[12]** It is common ground that the subject matter of the appellant's claim in the court below is the disputed property. According to the amended statement of claim the price of the said property was RM18,000 and that the disputed property was sold

to the appellant at the price of RM4,500 (which he had allegedly paid) subject to the existing charge to the bank which "facilities stood at about RM9,000 at the date of the filing of this action" (see amended statement of claim at para. 3, 5, 5(c) & 6)). The appellant did not deny that he only offered RM10,000 to the respondent for the disputed property and by comparing the same with the sale of a similar neighbourhood property he had also impliedly valued its worth at RM80,000 for a half share. Therefore in both his pleadings and in evidence the appellant had quantified the value of the subject matter of his claim and it fell short of the RM250,000 prescribed under s. 68(1)(a) CJA. That section bars such appeal being brought here unless leave of this court had been obtained.

[13] It was not open to the appellant to now adopt the respondent's estimation of value of the disputed property as its value from his standpoint of view for the purpose of s. 68. The case of *Malayan Banking Bhd v. Basaruddin Ahmad Khan (supra)* relied on for the principle is clearly against him. That was a claim for damages for breach of contract where the parties agreed to have the issue of liability to be tried first and in which the court dismissed the appellant's claim. On appeal the respondent's motion to dismiss it for failure to obtain leave under s. 68 CJA was held to be frivolous and lacking any merit on the ground that:

> The value of a claim, in the context of section 68(1)(a) is to be viewed from an appellant's standpoint. **Here, the pleaded value of the plaintiff's claim exceeds the statutory trigger**. (emphasis added).

Conversely, in our case the value of the subject matter of claim as pleaded was below the statutory trigger. The appellant's own standpoint, as gathered from his own pleading and testimony, put its worth well below the statutory trigger. The appeal was therefore incompetent as it was filed without the leave of this court having first been obtained.

[14] The phrase 'amount or value of the subject matter of the claim' in s. 68(1)(a) CJA was considered by the Supreme Court in *Yai Yen Hon v. Teng Ah Kok & Sim Huat Sdn Bhd & Anor* [1997] 2 CLJ 68 FC and it was held that it must be read as the amount or value of the claim filed in the civil suit and not the judgment amount appealed against, that would be the determinant factor in deciding whether leave was necessary. That was a case where the appellant claimed damages totalling RM4,000,000 arising

from an accident but only RM62,400 was awarded and it was held that leave of the court was not required for his appeal. The determinant factor is the value of the subject matter as dislcosed in the claim when filed. Applying that test the appellant must necessarily obtain leave of this court to pursue his appeal.

[15] As to whether leave was required in the case of a claim for specific relief, as in this case for a declaration, s. 68(1)(a) CJA makes no exception for such a case. The said provision is clear and unambiguous - see *Mohd Tahir Mohd Shariff v. Ramlah Abdullah* [2004] 1 CLJ 865. In *Amer Mohideen Dawood v. Sneh Bhar (supra)* the High Court ordered specific performance of a contract for sale of land against the appellant. His appeal was challenged for being incompetent for failure to obtain leave although the value of the subject matter was less from RM250,000. The appeal was dismissed by this court for being incompetent as the value of the subject matter of the order of specific performance was the purchase price of the land which was RM99,000 and no leave was obtained from the Court of Appeal. Our case is no different except the relief sought was for a declaration.

[16] To alleviate the then prevailing uncertainties faced by legal practitioners, a guideline in the form of the Court of Appeal Practice Direction No. 2 of 1996 was issued by the then President of this court. It listed out instances when prior consent of this court was not necessary before Notice of Appeal may be filed "in cases not connected with a specific amount or value." Item (ii) of the said guideline reads:

> ii) Declarations - to declare that the giving of a licence, an act, an omission or decision of a body or person empowered by law is invalid and annulled.

The declaration sought by the appellant in our case do not, by any stretch of the imagination come within the context listed. In any event, learned President of the Court of Appeal who issued the said guideline himself when presiding over a panel of this court was faced with a similar issue in *Lam Kong Co Ltd v. Thong Guan Co Pte Ltd (supra)*. It was there held that item (ii) of the said Practice Direction applies only to declarations respecting subject matters that have no value attached to them or those with values that cannot be quantified. Likewise in our case the subject matter of the claim had been identified and its value determined, hence the question of declaration became a non-issue. Failure to obtain leave of this court to appeal was thus fatal.

Enclosure 10a

[17] The two main grounds provided for the appellant's application did not appear to support the relief sought. The first stated ground was that the appellant's solicitors were only served with the notice of preliminary objection from the respondent's solicitors on 18 November 2008 and the second ground was that he was "of the view that no leave was required as the subject matter in the court below was more than RM250,000 nevertheless the application is necessary, in the interest of justice, to regularise the appeal if it is found by this Honourable Court that leave is required." Whether or not to allow leave to appeal is in the discretion of this court, there must be shown good and cogent reasons for its exercise. While the first ground might account for the last minute filing of encl. 10a, it did not explain why it could not be and was not done 5 1/2 years earlier before filing the notice of appeal. It could not possibly be a ground for the exercise of the court's discretion to grant leave to appeal. You cannot resuscitate a corpse by blaming your friend for not telling you that it was dead. The appellant must cross the legal threshold before he can be heard in this court. The respondent's failure to give earlier notice of the legal impediment did not attract an estoppel. A point of law can be raised at any stage with or without notice. As for the second ground, with the appellant taking the stand that the value of his claim was more than RM250,000, he provided the court with no material to merit the exercise of our discretion in his favour. If we accepted his stand, no leave was required rendering encl. 10a as an exercise in futility. On the contrary, the pleadings and the evidence quantified the value of the claim from the appellant's own standpoint and it was well below RM250,000. We were urged to regularise the appeal but the issue was not one of irregularity. It was a question of jurisdiction which was an issue of substance. In the circumstances there was no alternative but to dismiss the motion which we did.

The Appeal

[18] With the preliminary objection being upheld and encl. 10a being dismissed, the appeal must necessarily fall to the ground. We accordingly made the necessary order. Both my learned brothers Abdul Malik bin Ishak and Wan Adnan bin Muhamad JJCA have read this judgment in draft and have agreed to it but the former also has a supporting judgment.

A **Abdul Malik Bin Ishak JCA:**

[19] This is my supporting judgment to that of my learned brother Tengku Baharudin Shah bin Tengku Mahmud, JCA. Before the plaintiff appellant's appeal got off the ground, the defendant
B respondent raised a preliminary objection in regard to the incompetency of the appeal. Section 68(1)(a) of the Courts of Judicature Act 1964 was raised to prevent the appeal from proceeding. That section reads as follows:

C 68 Non-appealable matters

(1) No appeal shall be brought to the Court of Appeal in any of the following cases:

(a) when the amount or value of the subject-matter of the
D claim (exclusive of interest) is less than two hundred and fifty thousand ringgit, except with the leave of the Court of Appeal ...;

[20] If the amount or value of the subject matter of the claim, exclusive of interest, is less than RM250,000 then leave of this
E court is required before an appeal can proceed to this court. It is undeniable that leave has not been obtained by the plaintiff appellant.

[21] To ascertain the amount or value of the subject matter of
F the claim, an examination of the facts of the case will now be undertaken. First, it would be necessary to see what the plaintiff appellant was asking for. In the statement of claim, the plaintiff appellant prayed for the following orders and/or reliefs (see pp. 108 to 110 of the appeal record at volume 1):

G (1) a declaration that the Plaintiff is the beneficial owner of the 1/2 undivided share in Lot 1217 Section 3, Town of Ayer Itam, North East District, Penang together with the house erected thereon bearing postal address 513, Hill Railway Road, Penang (the said Property) previously belonging to the
H Plaintiff's brother Bhagwan Singh s/o Sohan Singh now deceased;

(2) an Order that the Defendant as administratrix of the said deceased be ordered to transfer the said 1/2 undivided share in the said land as such administratrix to the Plaintiff by
I executing a valid and registrable transfer in Form 14A within 14 days from the date of the Order of this Honourable

Court and in default thereof of the Senior Assistant Registrar of this Honourable Court be directed to do so for and on behalf of the Defendant;

(3) an Order that the Plaintiff shall be at liberty to proceed with the registration of the said transfer referred to in paragraph (2) above at the appropriate Land Registry;

(4) an Order directing the Registrar of Land Titles, Penang and/or other appropriate registering authority to do all such things as may be necessary to give effect to the Order to be made herein;

(5) in the meantime an injunction restraining the Defendant whether by herself, her servants or agents or otherwise howsoever from causing to be transferred into her name or as she may direct the said 1/2 undivided share in the said property or dealing with the aforesaid share in the said property in any manner whatsoever until the trial of this action. The Plaintiff undertakes to pay any damages that the Defendant might sustain as a consequence of the grant of this injunction in case it is later adjudged that the injunction ought not to have been issued;

(6) costs; and

(7) such further or other relief as may be deemed fit and proper.

[22] The High Court in Penang, after a full trial, dismissed the plaintiff appellant's claim with costs. This was on 16 April 2003. The plaintiff appellant filed his notice of appeal against the decision of the High Court on 12 May 2003. The record of appeal was also filed by the plaintiff appellant on 23 June 2003.

[23] The amended statement of defence would clearly show the amount or value of the subject matter of the claim. It is ideal to refer to para. 12(b) of the amended statement of defence at p. 187 of the appeal record at volume 1, which reads as follows:

(b) At the meeting held on 18 day of March 1998, the Defendant informed the Plaintiff that the half (1/2) undivided share of the deceased has been valued at RM248,500.00 by the Valuation Department and proposed to the Plaintiff either to sell his half (1/2) undivided share or purchase the deceased's half (1/2) undivided share; ... .

[24] And para. 12(c) of the amended statement of defence at p. 187 of the appeal record at volume 1, reads as follows:

> (c) It is upon knowing that the half (1/2) undivided share was valued at RM248,500.00 that the Plaintiff alleged that the deceased was holding the half (1/2) undivided share in trust for him and subsequently commenced this action.

[25] Reference to the word "deceased" would certainly refer to the late Bhagwan Singh s/o Sohan Singh. The deceased's half undivided share amounts to a mere RM248,500.

[26] And the letters of administration granted to the defendant respondent as seen at p. 417 of the appeal record at volume 2 shows an amount or value of the subject matter of the claim to be RM248,500 only.

[27] When the plaintiff appellant was being cross-examined, he said that he would be prepared to sell the property if he got a good price and even though he had not thought about the price he unwittingly said that his neighbours sold their property for RM160,000 (see p. 256 of the appeal record at volume 1).

[28] The Federal Court in *Lam Kong Co Ltd v. Thong Guan Co Pte Ltd* [2000] 1 CLJ 1, held that the legal authority to decide whether leave is required or not under sub-s. 1(a) of s. 68 of the Courts of Judicature Act 1964 is the Court of Appeal and that being the case the decision of the Court of Appeal is final. The Federal Court also held that to hold otherwise would lead to absurdity and defeat the "filter" principle unless an appeal from it is expressly given.

[29] The Federal Court in *Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors* [1995] 3 CLJ 485, held that if an appeal is to be lodged in the Court of Appeal in the circumstances falling within the terms of s. 68(1)(a) of the Courts of Judicature Act 1964, leave must first be obtained from the Court of Appeal. The Federal Court also held that the order granting or refusing leave to appeal by the Court of Appeal is final and not appealable to the Federal Court because it is not a judgment or an order within the meaning of s. 96(a) of the Courts of Judicature Act 1964.

[30] And, I say by way of an analogy that the decision of the Court of Appeal whether leave is required or not should similarly be final and not appealable.

[31] This court in *Amer Mohideen Dawood v. Sneh Bhar Ter Binder Singh* [1996] 2 CLJ 955, dismissed the appeal with costs because the appeal involving specific performance for the purchase of the land valued at RM99,000 was held to be incompetent as no leave to appeal was obtained from this court.

[32] Again, this court in *Mohd Tahir Mohd Sheriff v. Ramlah bt Abdullah* [2004] 1 CLJ 865, where the value of the land, after the initial payment, left a balance of RM98,320 and where the appeal was filed without leave of this court pursuant to s. 68(1)(a) of the Courts of Judicature Act 1964, forthwith struck out the appeal.

[33] The notice of motion in encl. 10a for leave to appeal under s. 68(1)(a) of the Courts of Judicature Act 1964 filed at the eleventh hour should not be entertained and it should be dismissed forthwith. For these reasons, I will now make those orders as made by my learned brother Tengku Baharudin Shah bin Tengku Mahmud JCA.